1994

Chambers v. Chambers : Brief of Appellee

Utah Court of Appeals

Mark J. Robens; Mariscal, Weeks, McIntyre & Friedlander; Pete N Vlahos; Vlahos, Sharp & Bradley; Attorneys for Defendant, Appellant and Cross-Appellee.
Brian R. Florence; Florence and Hutchison; Attorney for Plaintiff and Cross-Appellant.

IN THE UTAH COURT OF APPEALS

ERIN JO CHAMBERS, Plaintiff, Appellee and Cross-Appellant, vs. THOMAS D. CHAMBERS, Defendant, Appellant and Cross-Appellee.	: : : : : : :	Case No. 940210-CA Priority No. 15

BRIEF OF APPELLEE AND CROSS-APPELLANT

THIS IS AN APPEAL FROM ORDERS REGARDING ALIMONY AND ATTORNEY FEES PURSUANT TO FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ON REMAND OF THE SECOND JUDICIAL DISTRICT COURT, WEBER COUNTY, STATE OF UTAH, THE HONORABLE STANTON M. TAYLOR PRESIDING.

Brian R. Florence #1091
FLORENCE AND HUTCHISON
818-26th Street
Ogden, UT 84401
(801) 399-9291

Attorney for Plaintiff, Appellee and Cross-Appellant

Mark J. Robens #7213 (Arizona)
MARISCAL, WEEKS, McINTYRE & FRIEDLANDER, P.A.
2901 N. Central, Suite 200
Phoenix, AZ 85012
(602) 285-5000

Pete N. Vlahos #3337
VLAHOS, SHARP & BRADLEY
Legal Forum Building
2447 Kiesel Avenue
Ogden, UT 84401
(801) 621-2464

Attorneys for Defendant, Appellant and Cross-Appellee

IN THE UTAH COURT OF APPEALS

ERIN JO CHAMBERS,	:	
Plaintiff, Appellee and Cross-Appellant,	:	
vs.	:	
THOMAS D. CHAMBERS,	:	Case No. 940210-CA Priority No. 15
Defendant, Appellant and Cross-Appellee.	:	

BRIEF OF APPELLEE AND CROSS-APPELLANT

THIS IS AN APPEAL FROM ORDERS REGARDING ALIMONY AND ATTORNEY FEES PURSUANT TO FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ON REMAND OF THE SECOND JUDICIAL DISTRICT COURT, WEBER COUNTY, STATE OF UTAH, THE HONORABLE STANTON M. TAYLOR PRESIDING.

Brian R. Florence #1091
FLORENCE AND HUTCHISON
818-26th Street
Ogden, UT 84401
(801) 399-9291

Attorney for Plaintiff, Appellee and Cross-Appellant

Mark J. Robens #7213 (Arizona)
MARISCAL, WEEKS, McINTYRE & FRIEDLANDER, P.A.
2901 N. Central, Suite 200
Phoenix, AZ 85012
(602) 285-5000

Pete N. Vlahos #3337
VLAHOS, SHARP & BRADLEY
Legal Forum Building
2447 Kiesel Avenue
Ogden, UT 84401
(801) 621-2464

Attorneys for Defendant, Appellant and Cross-Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

IN THE UTAH COURT OF APPEALS

ERIN JO CHAMBERS,	:	
Plaintiff, Appellant and Cross-Appellee,	:	
v.	:	Case No. 940210-CA
	:	Priority No. 15
THOMAS D. CHAMBERS,	:	
Defendant, Appellee and Cross-Appellant.	:	

BRIEF OF APPELLANT AND CROSS-APPELLEE

JURISDICTION

The Court of Appeals of the State of Utah has jurisdiction to review all final judgments and orders of the District Court involving domestic relations cases pursuant to Section 78-2a-3, Utah Code Annotated (1953, as amended) and Rule 3 of the Utah Rules of Appellate Procedure.

STATEMENT OF ISSUES

1. THE TRIAL COURT SHOULD HAVE PERMITTED AN ADDITIONAL HEARING TO CONSIDER THE ISSUES ON REMAND. THERE WAS NO REASONABLE BASIS TO REDUCE THE AMOUNT OF ALIMONY PREVIOUSLY AWARDED TO MRS. CHAMBERS. IF A

reduced from $5,000.00 to $3,000.00 per month and then only terminate upon the occurrence of remarriage, death or operation of law. The original Decree terminated alimony entirely at the conclusion of six years.

On September 15, 1993, the parties' counsel met with the Court requesting additional clarification regarding the effective date of the reduction of alimony. Mr. Chambers was contending that the reduction should be retroactive to the original Decree date, thereby entitling him to a refund. The Court took that matter under advisement and issued a supplemental Memorandum on November 19, 1993, establishing the effective date as of the July 9, 1993 Memorandum Decision.

The defendant thereafter filed a Motion for Reconsideration/Rehearing which was heard on February 28, 1994 and denied. At that hearing, the Court agreed that it would sign plaintiff's proposed Findings of Fact, Conclusions of Law and Order on Remand which were in fact signed on March 2, 1994.

Mr. Chambers filed his appeal on March 29, 1994 and Mrs. Chambers filed her cross-appeal on April 7, 1994.

III. DISPOSITION AT TRIAL COURT.

The relevant portions of the Court's Order on Remand

which form the basis of the issues on appeal and cross-appeal are:

A. The Court reduced Mrs. Chambers' alimony from $10,000.00 per month to $7,000.00 per month effective with the Court's Memorandum Decision dated July 12, 1993, which was to continue for the balance of the original three-year rehabilitative period.

B. Beginning with the fourth year, the alimony was to be reduced from the original $5,000.00 per month amount to $3,000.00 per month.

C. The alimony would only terminate upon the occurrence of remarriage, death or operation of law, rather than at the end of six years as originally ordered.

D. The $10,000.00 attorney fee award made at the time of trial was affirmed.

STATEMENT OF FACTS

In the original trial, the parties stipulated that Mr. Chambers would pay $1,500.00 per month per child for the three minor child or a total of $4,500.00 per month child support. (T - Vol. IV pp. 52, 53)

The Court ordered Mr. Chambers to pay alimony in the sum of $10,000.00 per month for three years commencing

November 1, 1990 and $5,000.00 per month thereafter for three years commencing November 1, 1993. The alimony was then ordered to cease at the conclusion of the six-year period or earlier if the plaintiff died, remarried or cohabited. (R - 394) The Court further required Mr. Chambers to pay $10,000.00 to assist Mrs. Chambers in the payment of her attorney fees in addition to those sums he had already paid to assist her in the preparation and prosecution of the divorce. (R - 396)

Mrs. Chambers appealed the amount of alimony awarded her, its automatic reduction after three years and its termination after six years. She also appealed the Court's partial reimbursement of the attorney fees incurred by her.

Mr. Chambers appealed the award of alimony in its entirety and the award of attorney fees.

This Court's decision in Chambers v. Chambers, 840 P.2d 841 (Utah App. 1992), reversed and remanded in part and affirmed in part. With respect to alimony, the trial Court was instructed to:

1. Make further findings to address Mrs. Chambers' level of education, health and other matters concerning her immediate or eventual employability.

2. Further articulate the automatic reduction of alimony based on the "substantial income from assets that have been awarded to (Mrs. Chambers)".

3. Explain why Mr. Chambers has the ability to pay.

4. Reconsider the Court's apparent inclusion of children's expenses in the alimony award and to adjust child support if necessary to cover their expenses.

With respect to attorney fees, the trial Court was instructed to:

1. Consider the partial reimbursement of plaintiff's attorney fees based on the standards announced in Bell v. Bell, 810 P.2d 489 (Utah App. 1991).

After remand, Mr. Chambers filed a Memorandum on Remand contending that sufficient evidence existed in the record to support supplemental findings and that additional evidence would not be necessary. Mr. Chambers also submitted proposed Supplemental Findings of Fact, Conclusions of Law and Amended Decree of Divorce NUNC PRO TUNC to November 30, 1990.[1]

---

[1] Defendant's Memorandum on Remand has not been paginated by the court clerk. It is in the trial record in a bound volume and was filed with the District Court of Weber County on January 20, 1993. Mr. Chambers' proposed Supplemental Findings of Fact and Decree of Divorce Nunc Pro Tunc do appear in the record. (R - pp. 967-975)

Mrs. Chambers filed a remand response Memorandum.[2]

Mr. Chambers filed a reply to Mrs. Chambers response. (R - 703-711)

A hearing was conducted on June 7, 1993.[3] No evidence was taken at this hearing. The Court merely heard argument of counsel concerning their respective positions.

It was the opinion of Mr. Chambers' that the trial record was complete in every material respect relevant to the Court of Appeals' Order on Remand and the trial Court could merely supplement its findings based on the record already in existence. (T - 2, 3)

Mrs. Chambers argued that while some aspects of the remand requirements could be adjusted by a review of the trial transcript, in order to adequately reconsider issues directed by the Court of Appeals, some further evidence would be necessary to conform to those remand instructions. (T - 19) Specifically, it was contended that additional evidence would be necessary concerning her attorney fees to cure any deficiency that might have

---

[2] It was not until the preparation of this Brief that Mrs. Chambers' counsel discovered that her original remand response Memorandum was not contained in the Court's file.

[3] All references to the transcript of this hearing are to page numbers utilized by the court reporter. It has not otherwise been paginated by the court clerk.

existed in the record since it was the Court's suggestion that evidence would not be necessary at the time of trial. (T - 26-28)

Mrs. Chambers' also pointed out that her needs and expenses concerning her gross alimony award were premised at trial upon her ability to be successful in a property award of Mr. Chambers' future value in his basketball contract and absent that, her alimony award request needed to be supplemented to take into account other aspects of her standard of living that were not articulated in her trial exhibit number 11, i.e. investments and retirement accounts and benefits.[4] She asked the Court to permit additional evidence to articulate those needs. (T - 30-32)

It was also contended by Mrs. Chambers' that the recent case of Godfrey v. Godfrey, 854 P.2d 585 (Utah App. 1993), required the trial Court to equalize the post-divorce standard of living. Godfrey quoted Chambers v. Chambers as authority. Mrs. Chambers argued that the trial Court had failed to do this in the original decision. Mrs. Chambers further claimed that her exhibit 11 was nothing more than her bare living necessities for

---

[4] An issue in the original appeal was whether or not Mr. Chambers' future value in his basketball contract was a marital asset. The Court of Appeals held it was not.

the six-month period of separation preceding the divorce and that to fashion an award that would equalize post-divorce standards of living, would require additional testimony. (T - 33, 34)

The Court of Appeals in Chambers v. Chambers, supra, had suggested that upon remand, the District Court:

> Must reconsider its apparent inclusion of the children's expenses in Mrs. Chambers' alimony award. In its findings, the Court acknowledges that many of the expenses listed in Mrs. Chambers' request for $10,000.00 per month alimony were expenses that applied to the children. In view of the District Court's award of $4,500.00 per month in child support, it is plainly inequitable that Mr. Chambers' alimony payment includes the children's expenses. If the child support that the parties stipulated to is insufficient to cover the children's expenses, then the Court must award sufficient child support, not increase alimony to include the children's expenses. (See footnote 1 to Decision)

At this initial remand hearing, Mrs. Chambers also requested that the Court permit a brief hearing so she could explain her exhibit of needs and list of expenses and respond to what the Court of Appeals felt had been overlapped alimony and child support.[5] (T - 34-36)

At the conclusion of the hearing, the Court said:

---

[5] Mr. Chambers' Memorandum on Remand contained an analysis of what he believed were overlapped expenses for the children and Mrs. Chambers. If that analysis were accepted, the child support should have been increased.

> I don't see the necessity for the retrial of the case. I think that the Court has heard the evidence and the record is available to me. And I believe that the Court is able to follow the directions of the Court of Appeals in handing down a new Findings of Fact, Conclusions of Law and Decree relating specifically to the three issues: alimony, attorney fees and the division of the retirement. (T - 54, 55)[6]

The Court issued its Memorandum Decision on July 12, 1993. With respect to the issue of alimony, the Court said:

> In reconsidering the alimony award in the original decree, it occurs to me that there were miscalculations. I found that plaintiff's exhibit 11 correctly reflected the needs of the plaintiff and her children at about $10,000 per month. That amount fails to consider her additional need of health and accident insurance (previously provided by the defendant) and money to offset her tax liability for her receipt of alimony. I recognized that there were substantial children's expenses involved in the exhibit 11 needs assessment, but felt that the child support nearly equaled the amount of children's expense alleged on exhibit 11 and the $4,500 child support was included in the income calculations.
>
> In recalculating the alimony, if we accept the expenses of exhibit 11 and add the expense of health and accident insurance and taxes on the alimony paid, and then deduct the child support,

---

[6] The parties have not re-appealed the issue of retirement.

that means the plaintiff has need of about $7,000 to maintain her prior standard of living.

This ruling does not factor in any consideration of the plaintiff's ability to provide for herself or money received as returns on investments from assets awarded as a part of the property division. It is the intent of the Court that the plaintiff should have the initial three years as a rehabilitative period to: marshall her assets, learns to invest appropriately, make decisions about her future, prepare for future employment, become settled, etc. Thereafter, the Court adopts as its finding, paragraphs 10 and 11 from the Defendant's Supplemental Findings of Fact, etc. relating to the plaintiff's ability to care for herself, and based upon that finding, imputes income to the plaintiff of $736 per month.

The plaintiff received as her share of the property division $1,479,578. Realistically, it would not be fair to consider that figure as her investment base. There are obviously attorneys' fees and costs of the proceeding, as well as taxes to pay, etc. She has also requested that we deduct from her investment base her purchase of a home and the debt by her family. It would not be appropriate to allow the plaintiff to remove the home from her investment base and also allow her to claim rent expense of over $1,000 per month.

Figuring a 4% return on her investment base, the imputed income of $736, and the child support, the alimony award should be reduced at the end of three years to $3,000 per month.

> I had previously ordered termination of alimony at the end of three years. That decision was based on the fact that when the defendant is through with basketball, his ability to produce income is frankly no better than the plaintiffs. His present earning ability is based strictly upon his status as a professional athlete. In retrospect, that is not entirely correct, for it fails to consider the income he will earn in the meantime. His investment base, considering his interim income, should exceed hers by several times, giving him by far a superior ability to provide on-going assistance.
>
> The alimony then should not terminate except upon the occurrence of remarriage, death, etc. (R - 732-734)

With respect to the issue of attorney fees, the Court said:

> The final issue requiring consideration is that of the attorneys' fee award. The stipulation at trial, as the court understood it, was that if Mr. Dolowitz were called to testify, he would verify the material contained in plaintiff's exhibit 17 and express the opinion that the time and costs involved were reasonable taking into account the complexity and seriousness of the issues involved. The defendant did not stipulate the charges or time were reasonable, but only that would be Mr. Dolowitz's testimony.
>
> The exhibit (17) contained a summary sheet of the gross charges, a breakdown of the hourly rate of persons from Mr. Dolowitz's office working upon the plaintiff's case, a monthly summary of charges, times and persons, and finally a day-by-day account of date,

attorney, service description, hours and charge (amount). In considering the complexity of the issues, the number of hearings, the conferences, the resolution of issues, the animosity between the parties, the amounts of money and property, etc., the Court believes the charges were not unreasonable.

The second issue relates to the fact that the defendant with a multiple million dollar income clearly has the ability to assist the plaintiff with her attorneys fees. In fact, in a comparison of the resources of the two parties, he is in a much superior position.

The final prong of the "Bell" (810 P.2d 489) analysis relates to the ability of the plaintiff to pay her own attorneys' fees. It is clear with the distribution of almost a million and a half dollars in assets, that the plaintiff could pay her own attorney. However, the Court was concerned about the necessity of her being able to maintain an appropriate investment base. I was aware that there would be substantial inroads into that base by reason of taxes, the debt owed by her family (which is likely uncollectible), court costs, witness' fees, attorneys' fees, etc. In the interest of her being able to maintain a base sufficient to provide an appropriate income, I felt she needed some assistance with the fees. I ruled the attorneys' fees previously paid, have been paid with marital assets not to be considered in the final distribution, and awarded her an additional $10,000 to apply to her attorneys' fees. Based upon the

> above considerations, I find that the plaintiff has need of assistance with her attorneys' fees. (R - 734-736)

The parties' counsel met with the Court on September 15, 1993 requesting additional clarification regarding the effective date of the reduction of alimony. The Court took that matter under advisement and issued a Supplemental Memorandum on November 19, 1993. In the Supplemental Memorandum, the Court said:

> In the Court's reconsideration of alimony in response to an order of the appellate Court, I had failed to specify disposition of the overpayment from the time of the original decree to the time of the order of the Court of Appeals.
>
> Upon reflection, that failure may have been a result of a subconscious desire to not address the issue in hopes it would go away.
>
> To require the plaintiff to repay those overpayments would seriously affect her ability to maintain her standard of living.
>
> It would undermine further her investment base to a very serious extent. In addition, in dividing the estate, we had awarded to her an obligation of her family which at this point seems unlikely to be collected. The decision to loan the money to the plaintiff's brother appears to have been a joint decision. The diminution of her estate by both the loan and repayment of alimony based upon the Court's mistake, somehow seems unfair.

> The Court accordingly declines to order repayment based upon the equities of property division, earning ability, etc. (R - 766-767)

Proposed Findings of Fact, Conclusions of Law and Order on Remand were prepared. Mr. Chambers filed a Motion for Reconsideration/Rehearing. A hearing was conducted February 28, 1994. No evidence was taken, but the Court heard argument of counsel.[7] At that hearing, Mr. Chambers' counsel argued that there was no evidence in the record to consider Mrs. Chambers' standard of living that would justify the Court failing to order her to repay the overpayment of alimony. (T - 5)

Mr. Chambers' counsel also argued there was no evidence in the record that would justify extending the alimony beyond the original six-year period. (T - 13)

At the conclusion of the hearing, the Court stated:

> The whole basis for the court's decision concerning the pay-back issue is one of equity. While I recognize that there's some real justice in what you have suggested, it all comes back to the issue of what's really fair. And that's where I kept getting hung up.
>
> Frankly, Mr. Florence, if you feel that the concept of retroactivity is more defensible, I think based

---

[7] All references to the transcript of this hearing are to page numbers utilized by the court reporter. It has not otherwise been paginated by the court clerk.

> upon the Court's previous finding -- and I'll be candid. I hadn't considered -- even thought about that. I guess I presumed that it would be required of the Court to make a ruling concerning whether she has to pay it back or not. I don't think I'd considered the possibility of just saying it's not retroactive, although I guess the net effect of saying she doesn't have to pay it back is that it not be retroactive. If you feel that's a more defensible position, I have no objection to making a specific finding that it isn't retroactive.
>
> And I recognize the justice of what you're saying, but we're not dealing with a contract matter where somebody has borrowed money from somebody else and now they don't have to pay it back. We're dealing with the division of assets and with standards of living in a divorce action which is a whole different ball game.
>
> And while I have some sympathy for, you know, the plea that you've made, it just doesn't seem fair. Just doesn't seem fair.
>
> If you want me, Mr. Florence, to make specific findings as you've previously proposed or if you'd like to redo findings concerning that specific aspect of retroactivity, I'll be glad to consider it either way. (T - 34-36)

The Court agreed to sign the proposed Findings, Conclusions and Order on Remand previously submitted by Mrs. Chambers' counsel. (T - 39) They were in fact signed on March 2, 1994. (R - 921-932)

From these Decisions, both parties have filed their appeals.

SUMMARY OF ARGUMENT

To better address the issues on remand, the trial Court should have conducted a brief evidentiary hearing. The Court's Order on Remand arbitrarily reduced the prior award of alimony. If any change in the original Decree was justified, the alimony should have been increased. Mrs. Chambers' original request for alimony was premised upon her belief that she would receive as part of her property settlement a portion of the value of Mr. Chambers' future basketball contract. Absent that, her request for alimony needed to be increased. When the trial Court and Court of Appeals rejected her claim for an interest in the basketball contract, the Court should have considered her additional needs not covered by her alimony request at trial.

The reduction of alimony for the first three years was not based on any facts. The Court apparently erred in its math. The reduction of alimony after three years was also without any factual basis and failed to even come close to maintaining Mrs. Chambers' marital standard of living or equalizing the post-divorce standards of living.

Since the Court reduced her alimony, presumably on the basis that the other assets awarded her would assist with her needs, it was inappropriate for the trial Court to only make a nominal award of attorney fees. If attorney fees were justified, there was no articulated basis to deny her request for full reimbursement.

ARGUMENT

POINT I

THE TRIAL COURT SHOULD HAVE PERMITTED AN ADDITIONAL HEARING TO CONSIDER THE ISSUES ON REMAND. THERE WAS NO REASONABLE BASIS TO REDUCE THE AMOUNT OF ALIMONY PREVIOUSLY AWARDED TO MRS. CHAMBERS. IF A REDUCTION WAS JUSTIFIED, IT WOULD NOT BE APPROPRIATE TO REQUIRE MRS. CHAMBERS TO REIMBURSE MR. CHAMBERS.

In the original appeal, Mrs. Chambers was arguing that the future contract payments for Mr. Chambers to play basketball for the Phoenix Suns was a marital asset which should be subject to division. The trial Court had concluded that the future earnings of Mr. Chambers were not a property right subject to division.

Both at trial and on appeal, Mrs. Chambers urged that if the contract payments were not to be divided, then the large disparity in the parties' incomes should be equitably treated by a larger alimony award.

The Court of Appeals in Chambers v. Chambers, 840 P.2d 841 (Utah App. 1992), held that Mr. Chambers' future contract payments were not marital property rights subject to division. (At page 845) With respect to alimony, the Court criticized the trial Court's findings as being insufficient. The trial Court had awarded Mrs. Chambers alimony in the sum of $10,000.00 per month which would continue for three years, after which the alimony would be reduced to $5,000.00 per month for an additional three years, after which it would terminate. The Court of Appeals stated that the second prong of Schindler v. Schindler, 776 P.2d 84 (Utah App. 1989), that is the ability of Mrs. Chambers to produce a sufficient income for herself, had not been addressed. Specifically, Mrs. Chambers' level of education, health and other matters concerning her immediate or eventual employability, had not been commented upon. (At page 843)

The Court of Appeals also said that the third prong of Schindler, that is the ability of the responding spouse to provide support, had not been met in as much as the Court only stated that: "The defendant has the ability to pay". (At page 843)

The Court of Appeals further held that the trial Court's reliance upon "substantial income from assets that have been awarded to her" as justification to reduce and subsequently terminate alimony was insufficient without further explanation. (At page 843)

Additionally, by footnote, the Court of Appeals said:

> The District Court must reconsider its apparent inclusion of the children's expenses in Mrs. Chambers' alimony award. In its findings, the Court acknowledges that many of the expenses listed in Mrs. Chambers' request for $10,000.00 per month alimony were expenses that applied to the children. In view of the District Court's award of $4,500.00 per month in child support, it is plainly inequitable that Mr. Chambers' alimony payment includes the children's expenses. If the child support that the parties stipulated to is insufficient to cover the children's expenses, then the Court must award sufficient child support, not increase alimony to include the children's expenses. (At page 843)

Over the objection of Mrs. Chambers, these remand requirements were only considered by the trial Court by arguments of counsel at the hearing on June 7, 1993. With respect to the direction that the Court enter additional findings to address Mrs. Chambers' level of education, health and other matters concerning her immediate or eventual employability, Mrs. Chambers

conceded that considerable testimony was received at trial concerning her education, health and past employment history, but contended that no testimony was elicited at trial regarding her future employability. In any event, in the Court's Memorandum Decision issued July 12, 1993, the Court adopted as its findings paragraphs 10 and 11 from defendant's proposed Supplemental Findings of Fact, etc. relating to the plaintiff's ability to care for herself and based upon those findings, imputed income to Mrs. Chambers of $736.00 per month. In this regard, the Supplemental Findings appear in paragraph 10 of the Court's Findings of Fact, Conclusions of Law and Order on Remand. (R - 925)

With respect to the requirement that the Court give further explanation to justify a reduction of alimony, the Court had said in its original Decision that Mrs. Chambers would be able to earn substantial income from the assets awarded to her and used this as its justification for first reducing the alimony after three years and then terminating it altogether after six. On remand, the Court said that the reduction after three years was based on a 4% return on Mrs. Chambers'

investment based and the imputed additional income of $736.00 per month. After agreeing that the property award to Mrs. Chambers should not be totally considered her true investment base, the Court made no further finding as to what her investment base should be. The original decision to terminate alimony altogether was based upon the fact that when Mr. Chambers was through with basketball, his ability to produce income would be no better than the plaintiffs. In retrospect, the trial Court concluded that was not entirely correct for it failed to consider the income he would earn in the meantime which was substantially greater than Mrs. Chambers, thereby giving him a far superior ability to provide on-going assistance. Accordingly, the Court concluded that the alimony should not terminate except upon the occurrence of remarriage and death. (R - 732-734)

With respect to the Court of Appeals' direction that the trial Court explain why the defendant had the ability to pay, the Court on remand failed to address this issue entirely. What we do know from the original trial was that in the first year following the trial, Mr. Chambers was to receive $116,667.00 per month gross. In the second year, that figure was to increase to

$141,667.00 per month gross. In the third year following the trial, Mr. Chambers was to receive $166,667.00 per month gross. Not taking into account what has in fact happened to Mr. Chambers since the divorce trial, the contract presented at trial showed that in the fourth year following the trial, he would be receiving $47,917.00 per month which would continue for the remainder of the six-year period. While the Court has not specifically made findings that Mr. Chambers had the ability to pay the alimony that was ordered, it has recently been held in Hill v. Hill, 869 P.2d 963 (Utah App. 1994), that unstated findings of the Court could be implied if it was reasonable to assume that the Court actually considered the evidence and necessarily made the finding to resolve the controversy, but simply failed to record the factual determination that it made. In this particular case, there was no disagreement as to what Mr. Chambers' gross income was going to be pursuant to his contract with the Phoenix Suns and at no time did he ever suggest he lacked the ability to pay reasonable alimony to Mrs. Chambers. The finding of Mr. Chambers' ability to pay should therefore be implied.

It is the footnote to Chambers v. Chambers, supra,

which caused the trial Court to recalculate alimony and is the primary basis for both parties' appeals, Mr. Chambers claims that the recalculation should result in a refund to him and Mrs. Chambers claims that the Court should not have reduced the alimony at all, but increased it or increased child support or both. The footnote directed the trial Court to reconsider its apparent inclusion of children's expenses in Mrs. Chambers' alimony award.

In defendant's Memorandum on Remand, Mr. Chambers argued that Mrs. Chambers' exhibit 11 which itemized expenses of $9,997.73 per month, was the amount necessary to cover her and the children's expenses. Mr. Chambers then detailed what he believed to be the children's expenses actually implicit in exhibit 11 and concluded that $4,783.36 should be attributed to children's expenses and $5,214.37 was Mrs. Chambers' net request for alimony. If this argument were accepted, child support should have been increased when the alimony was decreased.

Mrs. Chambers' trial exhibit 11 is attached as an addendum to this Brief. As can be seen, her total support request was actually $14,060.00 which included

$4,060.60 taxes that would be due on her alimony award of $10,000.00 per month. The parties had stipulated to a total child support award of $1,500.00 per month per child or a total of $4,500.00 and the $10,000.00 alimony award originally given by the Court did nothing more than meet Mrs. Chambers' requested needs which in fact included the needs for the children, but which altogether would have justified a total $14,060.00 per month award.

Mr. Chambers has mis-stated the nature of Mrs. Chambers' alimony request. He has persisted in suggesting that exhibit 11 was the maximum of her support request and was representative of her marital standard of living. During her testimony in the original trial, after reviewing her exhibit and the expenses listed, this exchange occurred:

> Q. Is this-- and is there any significant difference in the expenses set out in Exhibit 11-P and those you've spent during the marriage?
>
> A. Excuse me. Would you--
>
> Q. Is this the same as you have done during the marriage?
>
> A. No.
>
> Q. No? In what way is it different?
>
> A. Well, I used to be able to take the kids -- we would-during the season

we would fly back and forth and Tom always paid for those type of things and--and with this I could not do that now.

Q. Is this less than the standard of living you had during the marriage?

A. Yes.

Q. Do you think this is a reasonable request that you're making?

A. Yes

Q. Is there any component in Exhibit 11-P for investing or saving any money?

A. No

Q. You--you were here when I addressed an opening statement to the Court.

A. Yes.

Q. And said that we're dealing with the problem of Mr. Chambers' future earnings under the present five-year contract.

A. Yes

Q. If the Court were to determine that those represent not property to be divided, but earnings, would you desire more than--an alimony higher than 11-P in order to deal with investing or putting anything aside for yourself?

A. Yes.
(Transcript Volume II pages 12 and 13)

Mr. Chambers went into considerable detail citing the record in an effort to show that Mrs. Chamber's

stated needs, included expenses for the children. He acknowledge's that her exhibit for expenses was based "on a compilation of actual expenses during a six-month period in 1990 just before trial". (page 8) What is obviously lacking in this approach and further points to the necessity of an evidentiary hearing is that Mrs. Chambers' compilation of actual expenses is based on what she needed during a period of separation from Mr. Chambers, pending the trial, when she was totally dependant on him for her needs. It did not reflect in any measure, the standard of living the two of them enjoyed during the marriage, nor did it attempt to bring into any parity their future standard of living.

For instance, there was no provision in Mrs. Chambers' six-month actual living expense analysis (Exhibit 11) for her own health insurance needs for the future since Mr. Chambers had been paying them; no provision for any extended travel or trips, something Mr. Chambers could afford and obviously enjoyed himself but not calculated for Mrs. Chambers; no provision for tax preparation since Mr. Chambers had been paying; no ability for her to buy expensive gifts for the children, something that only Mr. Chambers has been able to do

since the divorce; no provision for Mrs. Chambers to make real estate or stock investments, to create a retirement plan or savings, something the parties obviously did during their marriage but Mrs. Chambers cannot now do.

The parties stipulated to $4,500.00 per month for the child support and the Court ordered $10,000.00 per month for alimony which was to reduce to $5,000.00 in November, 1993. The Court did nothing more than cover Mrs. Chambers' six-month pre-divorce expenses by the initial support award.

In the Court's Memorandum Decision of July 12, 1993, it said:

> In recalculating the alimony, if we accept the expenses of exhibit 11 and add the expenses of health and accident insurance and taxes on the alimony paid and then deduct the child support, that means the plaintiff has need of about $7,000.00 to maintain her prior standard of living. (R - 733)

This simply does not add up. If the Court accepts the expenses of exhibit 11, adds the expenses of health and accident insurance and taxes paid on alimony and deducted the $4,500.00 child support, it would still justify the original $10,000.00 per month alimony award. There is no factual or mathematical basis for the Court

to have reduced the alimony to $7,000.00.

It should also be kept in mind that Mrs. Chambers was couching the alimony request stated in exhibit 11 in the context of a request for a division of Mr. Chambers' future contract earnings. If that were not awarded to her, then it was her request that a higher alimony award be provided in order to allow her to invest and put aside things for herself such as Mr. Chambers would be able to do following the trial. As previously stated, exhibit 11 was nothing more than a compilation of the actual expenses incurred by Mrs. Chambers during a six-month period in 1990 just before trial. It did not reflect her true standard of living while residing with Mr. Chambers. It certainly did nothing by way of equalizing post-divorce standards of living.

Following the original Chambers decision, this Court decided Godfrey v. Godfrey, 854 P.2d 585 (Utah App. 1993). In Godfrey, the Court held that an alimony award should, after a marriage, and to the extent possible, equalize the parties' respective standards of living and maintain them at a level as close as possible to the standard of living enjoyed during the marriage. Chambers was cited as authority for this proposition. (At page

589) The trial Court's original $10,000.00 alimony award and indeed the reduction to $7,000.00 did not reflect in any measure the standard of living the two of them enjoyed during the marriage, nor did it attempt to bring into any parity their future standard of living. As stated above, there was no provision for any extended travel or trips for Mrs. Chambers, something Mr. Chambers could afford to do, no ability for her to buy expensive gifts for the children, no provision to make real estate or stock investments or to create a retirement plan or savings for herself. In light of the assets that existed at the conclusion of the marriage, asset accumulation was something the parties were obviously capable of doing during the marriage, but which Mrs. Chambers could not subsequently do based on the alimony award granted her. In fact, the Court was relying on the assets awarded Mrs. Chambers as a basis for setting the alimony.

In short, the trial Court should have increased the alimony rather than decreased it and, if anything, should have increased the amount of child support since, by Mr. Chambers' own analysis, the amount of money being expended for the children's needs pursuant to exhibit 11 exceeded the $4,500.00 per month that was stipulated to by the parties.

The Court claimed that its new ruling reducing the alimony from $10,000.0 to $7,000.00 per month for the balance of the first three-year period did not factor in any consideration of Mrs. Chambers' ability to provide for herself or the money she received as returns on investments from assets awarded her as part of the property division. In this regard, the Court said that:

> It is the intent of the Court that the plaintiff should have the initial three years as a rehabilitative period. To: marshall her assets, learn to invest appropriately, make decisions about her future, prepare for future employment, become settled, etc. (R - 733)

The Court did use her "investment base" and an additional imputed income to reduce the alimony after three years. The Court of Appeals specifically directed the trial Court to articulate any reduction of alimony based on assets awarded Mrs. Chambers.

Mr. Chambers has spent considerable time and detail discussing Mrs. Chambers' share of the property division totaling $1,479,578.00. The Court realized that realistically it would not be fair to consider that figure as her investment base (R - 733), but did not further articulate what an appropriate investment base would be. The Court suggested that a 4% return on an

investment base and the imputed income of $736.00 per month and the child support justified the further reduction of the alimony award to $3,000.00 per month at the end of three years. There is no further articulation as to how this sum was arrived at or what the true investment base would be. This was one of the reasons that Mrs. Chambers was urging an additional factual hearing to determine the true investment base that was income producing. For instance, some of the annuities awarded to her have not yet been received because of financial difficulties of one of the entities. She has been heavily taxed on other annuities actually paid and she incurred substantially higher attorney fees and expert witness fees than were originally anticipated or testified to at the time of trial. She would also have a substantial tax obligation on her share of the Seattle Supersonics payments awarded to her.

The Court's decision on remand reducing the sums of alimony are not supported by adequate findings. Johnson v. Johnson, 771 P.2d 696 (Utah App. 1989). Automatically decreasing alimony will not be justified unless specific findings are made which would support the automatic decrease. Rasband v. Rasband, 752 P.2d 1331 (Utah App. 1988).

In Howell v. Howell, 806 P.2d 1209 (Utah App. 1991), the defendant was claiming entitlement to a higher alimony award because of the disparity in income, length of marriage and respective earning abilities.

The Court said:

> We believe it is consistent with the goal of equalizing the parties' post-divorce status to look to the standard of living existing at or near the time of trial in determining alimony. This is consonant with the treatment of both marital property and child support and is better designed to equip both parties to go forward with their separate lives with relatively equal odds. . . In so holding, we agree with the dissenting opinion that determining standard of living is a "fact sensitive, subjective task". We disagree, however, that standard of living is determined by actual expenses alone. Those expenses may be necessarily lower than needed to maintain the appropriate standard of living for various reasons, including, possibly lack of income.

The Court went on to say that:

> The post-separation substantial increase in plaintiff's income was akin to deferred income. at 1212.

Also, in Martinez v. Martinez, 818 P. 2d 538 (Utah 1991), the Supreme Court, in eliminating the theory of

equitable restitution previously announced by the Court of Appeals in Martinez, stated that while ordinarily the needs of spouses for alimony are assessed in light of the standard of living they had during the marriage, "in some circumstances, it may be appropriate to try to equalize the spouses' respective standards of living". (At 540) These cases suggest that if any change in the alimony awarded Mrs. Chambers was to occur, it should have been increased. Given the substantial differences in income, Mrs. Chambers' post-divorce standard of living pales in comparison to Mr. Chambers.

In the event this Court concludes that the trial Court was justified in reducing the amount of alimony, it would not be appropriate to require Mrs. Chambers to reimburse the alimony actually paid by Mr. Chambers while the first appeal was pending and that which would have been paid by him had Judge Taylor's effective date of the reduction been different. In the original Decree, Mr. Chambers' $10,000.00 per month alimony requirement was to commence on November 1, 1990. In the Court's Order on Remand, it reduced the alimony to $7,000.00 per month effective with the Court's Memorandum Decision dated July 12, 1993. In this regard, the Court has

justified its conclusion that the effective date would not be retroactive to November 1, 1990. Judge Taylor concluded a repayment obligation "would seriously affect her ability to maintain her standard of living" and "would further undermine her investment base to a very serious extent". This is a discretionary right of the trial Court.

In Bingham v. Bingham, 872 P.2d 1065 (Utah App. 1994), in considering an excessive attorney fee award, this Court held that:

> Trial Court's have considerable discretion in determining the financial interests of divorced parties and that property and alimony awards will be upheld on appeal unless a clear and prejudicial abuse of discretion is demonstrated. Citing Hall v. Hall, 858 P.2d 1018 (Utah App. 1993; Jones v. Jones, 700 P.2d 1072 (Utah 1985); Howell v. Howell, 806 P.2d 1209 (Utah App.) cert. denied, 817 P.2d 327 (Utah 1991).

The effective date of the reduction of alimony was clearly within the Court's discretion. The Court has articulated the reason for choosing an effective date that would not require retroactive reimbursement.

If this Court concludes that Judge Taylor appropriately reduced the alimony, it would not

necessarily require that any retroactive application be imposed. There are two ways this could be approached.

If Judge Taylor considered the remand directions to require him to re-visit the issue of alimony consistent with those directions, then any subsequent order entered by him could be considered as a new order regarding alimony and its validity could be tested by normal standards of appellate review, i.e. adequate findings that do not constitute an abuse of discretion.

On the other hand, if a modified order is to be viewed as an overturning decision based on appellate order, then the normal considerations that are utilized in deciding whether a decision should be applied retroactively or prospectively would be followed.

In that regard, it was stated in Loyal Order of Moose No. 259 v. County Bd., 657 P.2d 257 (Utah 1982):

> Ordinarily an overruling decision has retroactive operation. State Farm Mutual Insurance Company v. Farmers Insurance, 27 Utah 2d 166, 493 P.2d 1002 (1972) (language appears there as dicta). Retroactive operation occurs, to some degree, whenever a case is applied in any manner to control the legal consequences flowing from fact situations which arose at a point earlier than the announcement of the new rule. The application may be to parties and facts of the case where the new rule is announced, to pending

> cases, to future-initiated cases arising from earlier events, or in some rare instances to terminated cases which are subject to collateral attack...
>
> Constitutional law neither requires nor prohibits retroactive operation of an overruling decision. A decision's operative effect is treated as a function of judicial policy rather than judicial power... In other words, the extent of the decision's application is left to the discretion of the court...
>
> Where overruled law has been justifiably relied upon or where retroactive operation creates a burden, the Court, in its discretion, may prohibit retroactive operation of the overruling decision. State Farm Mutual Insurance Co. v. Farmers Insurance, supra. In such instances, prospective operation of a court decision has long been applied.

And in Belden v. Dalbo, Inc., 752 P.2d 1317 (Ut. App. 1988) it was held that whether retroactive application should occur depends on whether "a substantial injustice would otherwise occur" or whether the prior law "had been justifiably relied on or a burden would be created". See also VanDyke v. Chappell, 818 P.2d 1023 (Utah 1991, whether "retroactive operation of the new law may otherwise create an undue burden" (at 1025) and Heslop v. Bank of Utah, 839 P.2d 828 (Utah 1992) which applied a "substantial injustice" standard (at 835).

With either approach, the trial Court has discretion to decide the effective date and has exercised that discretion in this case to prevent an injustice or create an unreasonable burden.

POINT II

MRS. CHAMBERS SHOULD HAVE BEEN AWARDED HER FULL REQUEST FOR ATTORNEY FEES.

In the original Chambers, supra, the Court of Appeals quoted the trial Court's finding with respect to attorney fees wherein the Court awarded Mrs. Chambers an additional $10,000.00 to be added to the $12,500.00 already paid by Mr. Chambers to assist in partial reimbursement of her estimated $58,050.00 attorney fees.[8]

The Court of Appeals indicated that the trial Court failed to address the reasonableness of the fees and stopped short of finding that each party would have the means to pay their own fees out of the money being distributed to both. Accordingly, the award of partial attorney fees was reversed with the direction that the trial Court reconsider this issue "under the standards announced in Bell". (At page 844)

---

[8] This was another area where Mrs. Chambers wanted to present additional evidence following remand. Her attorney fees in fact ended up in excess of $90,000.00 and her expert witness fees were in excess of $45,000.00.

The standards announced in Bell v. Bell, 810 P.2d 489 (Utah App. 1991), require the Court to consider and include in the findings factors such as:

A. The difficulty of the litigation.

B. The efficiency of the attorneys.

C. The reasonableness of the number of hours spent.

D. The customary fee and the locality.

E. The amount involved in the case.

F. The result attained.

G. The attorneys' expertise and experience.

H. To justify an award of the amount claimed.

At the hearing on June 7, 1993, Mrs. Chambers requested the Court to have the opportunity to have her trial counsel appear and testify with greater clarity concerning the Bell standards. It was suggested, however, that her lawyer had prepared an Affidavit with his detailed attorney fee request and was prepared to testify if necessary. It was the Court that suggested that testimony not be taken and that Mr. Chambers' counsel accept the Affidavit as to what Mr. Dolowitz would testify to if called and then the Court could make specific findings concerning the appropriate factors. (See trial transcript, volume 2, pp. 160-161;

June 7, 1993 hearing pp. 26-28, 56-57.)

In the Court's July 12, 1993 Memorandum Decision, the Court attempted to address each of the Bell standards. Although the Court did not articulate them one by one, it did comment upon the difficulty of the litigation, the amount in controversy and the reasonableness of the time and charges incurred. (R - 735)

With respect to Mr. Chambers' ability, the Court found that he had a multiple million dollar income and resources that put him in a much superior position to assist with the fees. (R - 736)

With respect to need, the Court said:

> It is clear with the distribution of almost a million and a half dollars in assets, that the plaintiff could pay her own attorney. However, the Court was concerned about the necessity of her being able to maintain an appropriate investment base. I was aware that there would be substantial inroads into that base by reason of taxes, the debt owed by her family (which is likely uncollectible), court costs, witness fees, attorney fees, etc. In the interest of her being able to maintain a base sufficient to provide an appropriate income, I felt she needed some assistance with the fees . . . Based upon the above considerations, I find that the plaintiff has need of assistance with her attorney fees. (R - 735)

The issue of attorney fees was argued again at the February 28, 1994 hearing. The Court was reminded of the language of the July Memorandum Decision and the Court declined any further modification or elaboration with respect to the issue of attorney fees. (T -36-38)

Since the assets awarded Mrs. Chambers were to be utilized, at least in the Court's mind, to justify the amount of the alimony awarded and its reduction after three years, the Court was correct in determining that she needed assistance with her attorney fees by not requiring her to make further inroads on those assets awarded to her, thereby depleting her ability to use those assets for her own purposes. Mr. Chambers was awarded an equal amount of assets, but maintained a monthly income several times that which would be available to Mrs. Chambers.

Given these findings, the only real issue should be why the full award of attorney fees was not granted.

As stated in Bell, supra, the Court must justify anything less than a full award of attorney fees. This was not done. If a partial award of attorney fees is granted, the Court must provide a specific finding as to why the award was partial. See Haumont v. Haumont,

793 P.2d 421, 426 (Utah App. 1990) and Muir v. Muir, 841 P.2d 736, 741 (Utah App. 1992).

ATTORNEY FEES ON APPEAL

Mrs. Chambers is requesting attorney fees on appeal. Where the trial Court has awarded attorney fees and the receiving spouse prevails on the main issues, attorney fees are generally awarded on appeal. Believing that she should prevail on the issues raised here, Mrs. Chambers is requesting reimbursement for the attorney fees incurred in the preparation and presentation of this appeal. Hall v. Hall, 858 P.2d 1018, 1027 (Utah App. 1993); Allred v. Allred, 835 P.2d 974, 979 (Utah App. 1992); Hill v. Hill, 869 P.2d 963, 967 (Utah App. 1994).

CONCLUSION

This case should be remanded once again with directions to the trial Court to conduct a hearing to adequately address the needs and circumstances of Mrs. Chambers and to fashion an alimony award that would provide her a true and equitable standard of living. At a minimum, the previously ordered alimony should be restored to her. She should also be awarded her full

request for attorney fees.

DATED this 13th day of September, 1994.

FLORENCE AND HUTCHISON

BRIAN R. FLORENCE
Attorney for Plaintiff,
Appellant and Cross-
Appellee
818-26th Street
Ogden, UT 84401

MAILING CERTIFICATE

I hereby certify that I mailed two true and correct copies of the foregoing Brief of Appellee and Cross-Appellant, postage prepaid, to the following attorneys for defendant, appellant and cross-appellee at the address listed on this 15th day of September, 1994.

Mark J. Robens, Esq.
2901 N. Central, Suite 200
Phoenix, AZ 85012

Pete N. Vlahos, Esq.
2447 Kiesel Avenue
Ogden, UT 84401

BRIAN R. FLORENCE

ADDENDUM

A. A copy of the Decree of Divorce.

B. A copy of the July 12, 1993 Memorandum Decision.

C. A copy of the November 19, 1993 Supplemental Decision.

D. A copy of the Findings of Fact, Conclusions of Law and Order on Remand.

E. A copy of plaintiff's trial exhibit 11.

1730

DAVID S. DOLOWITZ (Bar No. 0899)
of and for
COHNE, RAPPAPORT & SEGAL
Attorneys for Plaintiff
525 East 100 South, Suite 500
P.O. Box 11008
Salt Lake City, Utah 84147-0008
Telephone: (801) 532-2666

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY

STATE OF UTAH

----ooo0ooo----

ERIN JO CHAMBERS, Plaintiff, v. THOMAS D. CHAMBERS, Defendant.	***DECREE OF DIVORCE*** Civil No. 890901927 Judge Stanton M. Taylor

---ooo0ooo----

The above-entitled matter came before the court, the Honorable Stanton M. Taylor presiding, for trial on August 28, August 29, August 30 and August 31, 1990. The plaintiff was present in person and represented by counsel ***David S. Dolowitz*** of ***COHNE, RAPPAPORT & SEGAL, P.C.*** The defendant was present in person and represented by counsel ***Mark J. Robens***, Esquire of ***SMITH, & FEOLA, P.C.*** and ***Pete N. Vlahos*** of ***VLAHOS, SHARP & WIGHT.*** Prior to the commencement of trial, the parties presented to the court, a ***Stipulation*** to provide for the custody and visitation of the minor children of the parties which can be added to or changed by the mental health professionals with consent of the parties.

The court then heard the parties and the witnesses on their behalf, reviewed the exhibits received into evidence,

considered the arguments and proffers of counsel, heard the ***Stipulation*** into which the parties entered into in regard to their property in terms of valuation and distribution on August 31, 1990, and being thus advised in the premises, and having made and entered its ***Findings of Fact*** and ***Conclusions of Law,*** now,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. This court has jurisdiction over the parties, the subject matter of this action and the minor children of the parties.

2. Each of the parties is awarded a ***Decree of Divorce*** from the other terminating their marriage. The ***Decree of Divorce*** shall become final upon entry.

3. Three (3) children have been born as issue of this marriage, to-wit: Erica, age 10, born July 12, 1980; Skyler, age 7, born August 8, 1983; Megan, age 4, born April 21, 1986.

4. The children shall reside with Erin Chambers and shall be under her day-to-day control. Parenting issues which require a decision by both Erin Chambers and Tom Chambers shall be effected only through Dr. Hilton and Dr. Sargent.

5. The children shall visit with Tom Chambers as hereinafter set out. If any visit is not utilized as set out, it is lost and not made up.

   a. While Tom Chambers is in Utah and not engaged in his profession as a professional basketball player, he shall have the right to visit with the children every other weekend from Friday

at 5:00 p.m. until Sunday at 7:00 p.m.;

b. During the basketball season when Tom Chambers is practicing his profession as a professional basketball player, he shall be entitled to two weekend visits per month in Phoenix Arizona. These shall run from Friday after school until Sunday at 7:00 p.m. by which time the children shall be at the Salt Lake International Airport to conclude the visit. Those visits shall require a minimum of four days notice. If notice is not provided four days in advance, the visit shall not take place. The visit shall be at Tom Chamber's expense and the children shall be accompanied by an adult while traveling to and from Salt Lake City and Phoenix;

c. Tom Chambers shall be entitled to visit with the children for four days after Christmas and before New Year's Eve during the Christmas vacation from school. The four days shall be designated by him no later than two weeks in advance or this visit shall not occur;

d During the summer, Tom Chambers shall be entitled to two, two-week visits upon providing a minimum of three weeks advance notice to Erin Chambers. That advance notice

shall specify the time and place he shall pick up the children and shall return the children;

e. There may be visits on unanticipated/special occasions about which the parties mutually agree;

f. Both parties shall use the other as "baby-sitter of choice" when the party with whom the children are staying need short-term care.

6. Tom Chambers shall engage in therapy with Dr. Clifford Hilton. This therapy is a condition of this ***Decree of Divorce,*** and if he does not follow through with the therapy, it shall be grounds for setting aside the child custody and visitation portions of this ***Decree of Divorce*** and bringing the matter back before the court. The therapy visits shall take place weekly in Ogden while Tom Chambers is in Utah during the off-season and regularly by telephone at Dr. Hilton's discretion during the playing season. Erin Chambers shall pursue and comply with her current treatment plan or its equivalent.

The children shall continue in therapy with Dr. Janice Sargent, who shall work with the minor children of the parties and Erin Chambers as is necessary to facilitate the communication issue and such other issues as Dr. Sargent and Dr. Hilton determine must be addressed in terms of working through a parent-child relationship between Erin Chambers and the children and Tom Chambers and the children. Tom Chambers shall pay any uninsured expenses of this therapy.

Each parent, Tom Chambers and Erin Chambers, shall not scrutinize the parenting actions of the other. This is a general admonition and when questions arise in their minds regarding the actions that the other has taken, these shall not be addressed to the children or to the other parent, but shall be addressed to Dr. Hilton and Dr. Sargent and shall be addressed by the parties only with the assistance of Dr. Hilton and Dr. Sargent.

Each of the parents, Tom Chambers and Erin Chambers, are enjoined and prohibited from denigrating the other to the children or quizzing the children about any actions taken by the other during visitation or residence. Any such questions should be addressed to Dr. Hilton and Dr. Sargent.

7. This matter shall come back before the court for further review either in one year or at the direction of the treating therapists, Dr. Hilton and Dr. Sargent should it be necessary prior to that time.

8. Dr. Hilton and Dr. Sargent shall consult with each other, the parties and the children as they deem necessary to assist in resolution of the communication problems between the parties. All costs of their services not paid by insurance shall by paid by Tom Chambers.

9. The defendant is ordered to pay to the plaintiff alimony in the sum of $10,000.00 per month for a period of three years commencing November 1, 1990. In November of 1993, the alimony award shall decrease to the sum of $5,000.00 per month which shall be paid for an additional three years subject to the

terms of the decree upon the payment of the alimony payment due in October of 1996, alimony shall cease. In the event that the plaintiff dies, remarries, or cohabits during the time that the alimony is being paid to her, it shall terminate.

10. The defendant shall pay to the plaintiff for the support and maintenance of the children of the minor parties the sum of $1,500.00 per month per child, for a total of $4,500.00 per month as child support. Said support to continue for each child until that child attains majority and graduates from high school with his or her regularly scheduled class provided however that the court shall retain jurisdiction to consider at the time that each of the older two (2) children attain majority whether the decrease in child support per child for the remaining children or child should be a full $1,500.00 per month at the time each child attains majority or a lesser sum under the then existing circumstances of the parties. It is acknowledged that defendant is paying child support in the amount of three (3) times higher than the maximum child support amount set forth by the child support schedule for three (3) children, and the higher amount is justified in allowing the children to share in the relative affluence of the defendant.

11. The defendant shall maintain such health, accident and dental insurance as is available to him through his employment for the minor children of the parties, and shall pay all uninsured medical, dental, eye care and orthodontic expenses by or on behalf of the children.

12. The defendant shall take all steps necessary to be

certain that the plaintiff is able to secure her COBRA benefits to health insurance from the NBA for insurance protection for 36 months after the entry of this Decree. All such medical insurance premiums and expenses shall be paid by plaintiff.

13. While there are substantial assets that are being distributed, it appears to the court that plaintiff is concerned about some kind of guaranteed future income. The defendant has secured retirement benefits through the NBA. These shall be divided between the parties by an appropriate, qualified, domestic relations order (QDRO) which shall be entered after this ***Decree of Divorce*** has been finalized and accepted by the court. If there is an immediate rollover available under the NBA plan that shall be effected. If not and division of the defendant's account is required to be effected by future distribution, it shall be divided according to the formula articulated by the Utah Supreme Court in the decision of ***Woodward vs. Woodward***, 656 P. 2d, 431 (Utah 1982) in which plaintiff would be entitled to one-half (1/2) of the pension proceeds accumulated during the years the parties were married during the time the pension was being accumulated.

14. The plaintiff is awarded all of the furniture, fixtures, furnishings and appliances located in the North Ogden home in which she resides with her children at the time of trial.

15. The defendant is awarded all of the furniture, fixtures, furnishings and appliances located in the home he is renting in Phoenix, the condominium in Eden, Utah and the cabin. In addition, he is awarded the bookends and Bev Doolittle book

which are presently in the possession of the plaintiff.

16. Each of the parties is ordered to make available the home videos and pictures which they have in their possession for copying by the other.

17. The plaintiff is awarded the 11.4% Washington State bonds, her checking account in Zions National Bank, the obligation from Ray Ward for $100,000.00, the obligation from Scott and Kerry Hall of $6,000.00, the Jeep Cherokee she is driving, the 1986 Chaparelle boat valued at $5,000.00 and one-half of the All Terrain vehicles.

18. The defendant is awarded his First Interstate bank account, his Zions First National Bank account, the leasehold improvements on his Phoenix home, the land in Pleasant View, Utah, the 200 acre parcel of mountain property, the approximately 95 acres of mountain property, the North Ogden horse property, the Mercedes-Benz automobile, the CJ-7 Jeep, one-half of the All Terrain vehicles, the four-horse trailer, the three-horse trailer, the All Terrain vehicle trailer, the GMC pickup truck, the tractor, the horses and mules, the interest in the race horse and the cabin and property of the parties.

19. To equalize the division of property between the parties, the defendant shall pay to the plaintiff the sum of

$377,892.00 [which includes the payments described in paragraphs 22 and 23(e)] from his one-half of the annuities or their proceeds if those must be cashed in upon receipt of those funds. This payment is governed by §1041 of the Internal Revenue Code.

20. The defendant has earned compensation from Seattle Supersonics, for which he has provided all of his services which compensation has been deferred. These payments are due in February of 1991, February of 1992 and February of 1993 These payments shall be divided equally between the parties. If, under Washington community property law, each of the parties may be paid one-half of these payments and the tax consequences of those payments borne by the party receiving those monies, then they shall be paid accordingly and this Decree specifically adopts and applies that Washington State Community Property law. If, however, under Washington State Community Property Law, these deferred payments are considered payment to the defendant and are earned income by him, he shall pay one-half of the gross proceeds of each payment to the plaintiff. This shall be considered for tax purposes, a § 71 (IRC) alimony payment. It shall be tax deductible to the defendant and taxable income to the plaintiff. This alimony provision shall be non-modifiable. If these payments, for any reason cannot be treated as set forth above and taxed to the recipient as described, then the defendant shall pay the taxes that are due on these payments, then pay one-half of the proceeds after the appropriate tax payments have been made to the plaintiff and the receipt by the plaintiff of these funds shall be considered a § 1041 (IRC)

Property Distribution.

21. The defendant shall receive payments of $133,333.00 in the month of September of 1990 and the month of October, 1990 from the Phoenix Suns. The defendant shall pay the regular withholding taxes from these sums at the same rate that he has paid for the preceding months of 1990. After those taxes have been withheld, the net sum remaining which the parties believe will be approximately $80,000.00, is to be paid one-half to each party upon receipt of those funds by the Defendant. The Plaintiff's receipt of her one-half of these funds shall be as a § 1041 (IRC) Property Distribution. Plaintiff acknowledges receipt of these payments.

22. The defendant shall pay to the plaintiff $115,000.00 in October of 1990 as a § 1041 (IRC) property distribution as settlement of her claim for dissipation of the marital estate and celebrity good will, fame and publicity, defendant's contract extension value, if any, promotional and complimentary items and basketball camps. This payment shall be made upon receipt of the annuity or funds from the annuities by the Defendant as described in paragraph 23(e) herein.

23. The following property shall be divided equally between the parties upon receipt or as soon as possible.

a. The payment due on the Nike contract of $5,000.00 after deduction by the defendant of the regular income tax withholding from that payment. That portion of this payment paid to the Plaintiff shall be considered a § 1041

(IRC) Division of Property.

b. The proceeds from the sale of the Bucklin Trust. The parties agree to divide equally the liabilities relating thereto.

c. The debt due on the Hall Woodway Investment ($43,125.00)and all expenses and liabilities relating thereto and the Hall Woodway Investment itself.

d. The proceeds, liabilities and expenses resulting from the Crenshaw loan/investment.

e. The $840,000.00 approximate gross worth of annuities due in October of 1990 from the Seattle Supersonics, provided if these can be divided equally so that each of the parties receives one-half and each of the parties may deal with their own tax consequences under the State of Washington's Community Property law, that shall be effected; if not, then the defendant shall have withheld his regular tax, his regular withholding tax on these annuities or payments and the annuities received, shall be divided equally between the parties, provided, however, on receipt of the annuities, the defendant shall pay the plaintiff's one-half (1/2) and then pay to plaintiff the $115,000.00 described above to

be considered a § 1041 (IRC) distribution of property to her.

On receipt of the annuities or funds by the defendant and after payment to the plaintiff of her one-half of these annuities or funds, defendant shall immediately make payment to plaintiff of the $115,000.00 hereinabove described under paragraph 23 which sum is included in the $377,892.00 described in paragraph 19 above.

f. The home in North Ogden, Utah and the condominium in Eden, Utah, shall be sold as soon as practical and the net proceeds of sale divided between the parties. The parties shall mutually agree upon a sales agent and shall hold title in both properties as tenants in common. Pending the sale of the Ogden home and Eden condominium, defendant will pay the mortgage, taxes, insurance, repairs, maintenance and homeowner's association fees relating thereto subject to the following conditions: With respect to the home in Ogden, Utah one-half (1/2) of all net proceeds, if any, will be distributed to the parties after all costs of sale have been deducted and defendant is reimbursed for all

expenses incurred relating to the house paid by the defendant up to the total proceeds. If the property is rented, there will be an appropriate credit for the amount of rent received until the property is sold. With respect to the condominium in Eden, Utah, one-half (1/2) of all the proceeds will be distributed to the parties after all costs of sale have been deducted and defendant has been reimbursed for all principal reductions made by virtue of defendant's payments relating to the condominium from and after August 31, 1990.

g. The plaintiff and defendant each shall receive one (1) share in the houseboat. The plaintiff shall receive the 1986 Chaparelle boat valued at $5,000.00.

h. The proceeds from the Life USA annuity.

i. The Bullger Basin investment and all expenses and disclosed liabilities relating thereto.

j. The Players Athletic investment and all expenses and liabilities disclosed prior to August 31, 1990 relating thereto.

k. The Triaxel stock and all expenses and liabilities relating thereto disclosed prior to August 31, 1990.

24. The defendant shall pay to the plaintiff the sum of $10,000.00 to assist her in payment of her attorney's fees. If this sum is paid within thirty-five days, this obligation shall be satisfied. If not, upon the filing by the plaintiff of an affidavit stating that these have not been paid, then judgment is hereby entered automatically by operation of the filing of that affidavit in favor of the plaintiff and against the defendant for the sum of $10,000.00.

25. As properties which are divided are in the name of and under the control of the defendant prior to their division, the defendant shall have the duty and he is ordered to give plaintiff names, telephone numbers and addresses of contact people on all properties awarded to plaintiff.

26. All joint credit card/charge accounts shall be closed and charges incurred shall be the responsibility of the party incurring the charge.

27. If the defendant becomes delinquent in his child support obligation in an amount at least equal to child support payable for one month, then the plaintiff is entitled to mandatory income withholding relief, pursuant to section 30-3-5-1 and 62A-11-403 (1953) as amended). This income withholding procedure shall apply to existing and future payors until such time as the defendant is no longer obligated to pay child support to the plaintiff.

28. Each party is ordered to take all actions required to implement the terms of this ***Decree of Divorce*** and to cooperate

with the other in signing all deeds and documents necessary to implement this Decree. Should any action be required to enforce the provisions of this ***Decree of Divorce,*** the party determined to have failed or refused to have complied with the provisions of the ***Decree of Divorce*** shall be assessed and required to pay the costs and attorney fees incurred in securing compliance with the ***Decree of Divorce.***

DATED this 30 day of Nov, 1990.

BY THE COURT:

STANTON M. TAYLOR
Third District Court Judge

STATE OF UTAH }
COUNTY OF WEBER } ss

I Hereby Certify That This Is A True Copy
Of The Original On File In My Office
DATED THIS 10th DAY OF Dec 1990
BENJAMIN A. SIMS
CLERK OF THE COURT
BY Lucy Bennett DEPUTY

APPROVED AS REFLECTING THE RULING OF THE COURT:

DAVID S. DOLOWITZ
Attorney for Plaintiff

MARK ROBENS
Attorney for Defendant

PETER VLAHOS
Attorney for Defendant

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY
STATE OF UTAH

ERIN JO CHAMBERS, Plaintiff, vs. THOMAS CHAMBERS Defendants.	)	MEMORANDUM DECISION JUL 12 1993 Case No. 890901927

The Court of Appeals reversed and remanded this case to this court outlining three areas for the court's reconsideration. Those three areas were alimony, division of retirement and an award of attorneys fees.

In this case there is no question that in considering the preferences established in Woodward (656 P2d 431), the facts would favor a present division of the retirement because the present value is determinable and there are sufficient assets in the estate to allow such a division. I have personally felt that there should be a strong preference favoring a division which would assure a non-working spouse with a secure independent retirement income. However I defer to the wisdom and law established by "Woodward" and award the Defendant his retirement upon payment by him of one half its present value ($32,379.46) to the Plaintiff. In addition, in the past there have been enhancements to the plan having retroactive effect. If there are enhancements taking effect after

the time of the trial of this matter, then the Plaintiff shall be entitled to her share of that enhancement based upon the Woodward formula.

In reconsidering the alimony award in the original decree, it occurs to me that there were miscalculations. I found that Plaintiff's exhibit 11 correctly reflected the needs of the Plaintiff and her children at about $10,000 per month. That amount fails to consider her additional need of health and accident insurance (previously provided by the Defendant) and money to offset her tax liability for her receipt of alimony. I recognized that there were substantial children's expenses involved in the exhibit 11 needs assessment, but felt that expense would be approximately offset by the fact that the child support nearly equaled the amount of children's' expense alleged on exhibit 11 and the $4500 child support was included in the income calculations.

In recalculating the alimony, if we accept the expenses of exhibit 11 and add the expense of health and accident insurance and taxes on the alimony paid, and then deduct the child support, that means the Plaintiff has need of about $7000 to maintain her prior standard of living.

This ruling does not factor in any consideration of the Plaintiff's ability to provide for herself or money received as returns on investments from assets awarded as a part of the

property division. It is the intent of the court that the Plaintiff should have the initial three years as a rehabilitative period to: marshall her assets, learn to invest appropriately, make decisions about her future, prepare for future employment, become settled, etc. Thereafter the court adopts as its finding, paragraphs 10 and 11 from the Defendant's Supplemental Findings of Fact, etc. relating to the Plaintiff's ability to care for herself, and based upon that finding imputes income to the Plaintiff of $736 per month.

The Plaintiff received as her share of the property division $1,479,578. Realistically it would not be fair to consider that figure as her investment base. There are obviously attorneys' fees and costs of the proceeding as well as taxes to pay, etc. She has also requested that we deduct from her investment base her purchase of a home and the debt by her family. It would not be appropriate to allow the Plaintiff to remove the home from her investment base and also allow her to claim rent expense of over $1000 per month.

Figuring a 4% return on her investment base, the imputed income of $736, and the child support, the alimony award should be reduced at the end of three years to $3000 per month.

I had previously ordered termination of alimony at the end of three years. That decision was based on the fact that when the Defendant is through with basketball his ability to produce income

is frankly no better than the Plaintiffs. His present earning ability is based strictly upon his status as a professional athlete. In retrospect that is not entirely correct, for it fails to consider the income he will earn in the meantime. His investmentbase, considering his interim income, should exceed hers by several times, giving him by far a superior ability to provide on-going assistance.

The alimony then should not terminate except upon the occurrence of remarriage, death etc.

The final issue requiring consideration is that of the attorneys' fee award. The stipulation at trial, as the court understood it, was that if Mr. Dolowitz were called to testify, he would verify the material contained in Plaintiff's exhibit 17 and express the opinion that the time and costs involved were reasonable taking into account the complexity and seriousness of the issues involved. The Defendant did not stipulate the charges or time were reasonable, but only that would be Mr. Dolowitz's testimony.

The exhibit (17) contained a summary sheet of the gross charges, a breakdown of the hourly rate of persons from Mr. Dolowitz's office working upon the Plaintiff's case, a monthly summary of charges, times, and persons, and finally a day-by-day account of date, attorney, service description, hours and charge

(amount). In considering the complexity of the issues, the number of hearings, the conferences, the resolution of issues, the animosity between the parties, the amounts of money and property, etc., the court believes the charges were not unreasonable.

The second issue relates to the fact that the Defendant with a multiple Million Dollar income clearly has the ability to assist the Plaintiff with her attorneys fees. In fact in a comparison of the resources of the two parties he is in a much superior position.

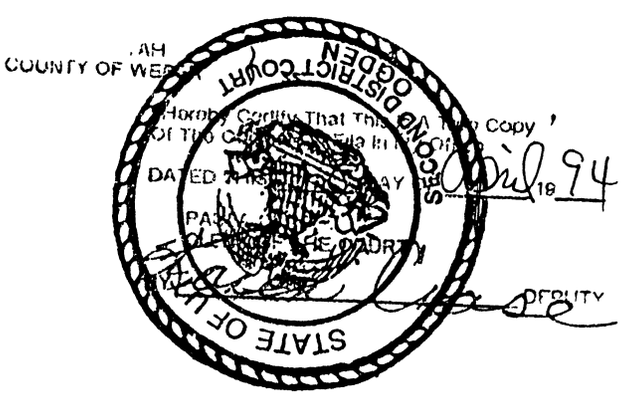
The final prong of the "Bell" (810 P2d 489) analysis relates to the ability of the Plaintiff to pay her own attorneys' fees. It is clear with the distribution of almost a million and a half dollars in assets, that the Plaintiff could pay her own attorney. However the court was concerned about the necessity of her being able to maintain an appropriate investment base. I was aware that there would be substantial inroads into that base by reason of taxes, the debt owed by her family (which is likely uncollectible), court costs, witness' fees , attorneys' fees, etc. In the interest of her being able to maintain a base sufficient to provide an appropriate income, I felt she needed some assistance with the fees. I ruled the attorneys' fees previously paid, have been paid with marital assets not to be considered in the final distribution, and awarded her an additional $10,000 to apply to her attorneys' fees. Based upon the above considerations I find that the

Plaintiff has need of assistance with her attorneys' fees.

I have referred above to the debt to her family, which is probably not collectable. There was some dispute at trial about whose idea the loan was and to whom it should be assigned. Iawarded it to the Plaintiff because it was to her family and because I believed that she had some influence in the decision process. There is likewise no question that the Defendant also had some responsibility for that decision. While it is not my intent to revisit that issue, I think it appropriate to point out that the reduction in her investment base was contributed to by that obligation and that is an equitable factor considered by the court.

Dated this 9 of July, 1993.

Stanton M. Taylor
District Court Judge



IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY
STATE OF UTAH

ERIN JO CHAMBERS, Plaintiff, vs. THOMAS D. CHAMBERS, Defendant.	)	SUPPLEMENTAL MEMORANDUM NOV 19 1993 Case No. 890901927

In the courts reconsideration of alimony in response to an order of the appellate court, I had failed to specify disposition of the overpayment from the time of the original decree to the time of the order of the Court of Appeals.

Upon reflection, that failure may have been a result of a subconscience desire to not address the issue in hopes it would go away.

To require the Plaintiff to repay those overpayments would seriously affect her ability to maintain her standard of living.

It would undermine further her investment base to a very serious extent. In addition, in dividing the estate, we had awarded to her an obligation of her family which at this point seems unlikely to be collected. The decision to loan the money to the plaintiff's brother appears to have been a joint decision. The

diminution of her estate by both the loan and repayment of alimony based upon the courts mistake, somehow seems unfair.

The Court accordingly declines to order repayment based upon the equities of property division, earning ability, etc.

DATED this 19 day of November, 1993.

STANTON M. TAYLOR, Judge

STATE OF UTAH
COUNTY OF WEBER
SECOND DISTRICT COURT
April 19 94
DEPUTY

CERTIFICATE OF MAILING

I hereby certify that on the 19th day of November, 1993, I sent a true and correct copy of the foregoing Supplemental Memorandum to counsel as follows:

Mark J. Robens, Esq.
MARISCAL, WEEKS, McINTYRE
& FRIEDLANDER
201 West Coolidge Street
Phoenix, AZ 85013

Brian R. Florence
FLORENCE AND HUTCHISON
818 26th Street
Ogden, UT 84401

Pete N. Vlahos
VLAHOS, SHARP & WIGHT
Legal Forum Building
2447 Kiesel Avenue
Ogden, UT 84401

Deputy Court Clerk

Brian R. Florence #1091
of FLORENCE AND HUTCHISON
Attorney for Plaintiff
818-26th Street
Ogden, UT 84401
399-9291 - / FAX 399-9333

IN THE DISTRICT COURT OF WEBER COUNTY

STATE OF UTAH

ERIN JO CHAMBERS, Plaintiff,	:	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ON REMAND
vs.	:	
THOMAS D. CHAMBERS, Defendant.	:	Civil No. 890901927 Hon. Stanton M. Taylor

MAR 2 1994

BACKGROUND

On October 21, 1992, the Utah Court of Appeals filed its decision on the earlier appeal of this case. See Chambers v. Chambers, 198 U.A.R. 49 (Utah App. 1992).

After remand, the matter was placed on the Court's calendar for a scheduling conference for January 19, 1993. The parties, through their respective counsel, appeared before the Court on that day, at which time the defendant, through his counsel, filed with the Court a Memorandum on Remand and proposed Supplemental Findings of Fact, Conclusions of Law and amended Decree of Divorce Nunc Pro Tunc. Defendant's Memorandum contended that sufficient evidence existed in the record to support supplemental Findings, Conclusions and Amended Decree of Divorce and that no further hearing should be necessary.

The Court gave plaintiff additional time to respond to

defendant's Memorandum and provisionally scheduled the matter for trial on June 24, 1993.

On February 17, 1993, the plaintiff, through her counsel, filed a Response to Memorandum and thereafter the Court scheduled a hearing for argument which was held June 7, 1993. The parties, through their respective counsel, presented their positions. At the conclusion of the hearing, the Court announced that it felt sufficient facts existed in the record to permit the Court to supplement its findings in conformance with the directions of the Court of Appeals, canceled the trial date and took the matter under advisement.

On July 9, 1993, the Court issued its Memorandum Decision.

On July 13, 1993, the plaintiff, through her counsel, asked the Court for some further clarification with respect to its decision, which clarification was provided by letter from the Court dated July 16, 1993.

On September 15, 1993, the parties' counsel met with the Court requesting additional clarification regarding the effective date of the reduction of alimony. The Court took that matter under further advisement and issued its Supplemental Memorandum on November 19, 1993.

With this background, the Court now enters the following:

FLORENCE AND HUTCHISON

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

818 - 26TH STREET
OGDEN, UTAH 84401

FINDINGS OF FACT

1. The Court of Appeals reversed and remanded this case to this Court outlining three areas for the Court's reconsideration. Those three areas were alimony, division of retirement and an award of attorney fees.

2. In this case, there is no question that in considering the preferences established in Woodward v. Woodward, 656 P.2d 431 (Utah 1982), the facts would favor a present division of the retirement because the present value is determinable and there are sufficient assets in the estate to allow such a division. The Court has personally felt that there should be a strong preference favoring a division which would assure a non-working spouse with a secure independent retirement income, but the Court defers to the wisdom and law established by Woodward.

3. In reconsidering the alimony award in the original Decree, it occurs that there were miscalculations.

4. Plaintiff's Exhibit 11 correctly reflected the needs of the plaintiff and her children at about $10,000.00 per month. That amount failed to consider her additional need of health and accident insurance (previously provided by the defendant) and money to offset her tax liability for her receipt of alimony.

5. The Court recognized there were substantial

children's expenses involved in the Exhibit 11 needs assessment, but those expenses would be approximately offset by the fact that the child support nearly equalled the amount of children's expense alleged on Exhibit 11 and the $4,500.00 child support was included in the income calculations.

6. In recalculating the alimony, if the Court accepts the expenses of Exhibit 11 and adds the expenses of health and accident insurance and taxes on the alimony paid and then deducts the child support, that means the plaintiff has need of about $7,000.00 to maintain her prior standard of living.

7. The estimated $7,000.00 for the plaintiff to maintain her prior standard of living does not factor into any consideration of the plaintiff's ability to provide for herself or money received as returns on investments from assets awarded to her as part of the property division.

8. It was the intent of the Court that the plaintiff should have the initial three years as a rehabilitative period to:

A. Martial her assets;

B. Learn to invest appropriately;

C. Make decisions about her future;

D. Prepare for future employment;

E. Become settled, etc.

9. In the Court's reconsideration of alimony in the

FLORENCE AND HUTCHISON

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

818 - 26TH STREET
OGDEN, UTAH 84401

Memorandum Decision issued July 9, 1993, the Court failed to specify the disposition of the over-payment of alimony from the time of the original Decree to the Order of the Court of Appeals. Upon reflection, that failure may have been a result of a subconscious desire to not address the issues in hopes it would go away. To require the plaintiff to repay those over-payments would seriously affect her ability to maintain her standard of living. It would undermine further her investment base to a very serious extent. In addition, in dividing the estate, we had awarded to her an obligation of her family which at this point seems unlikely to be collected. The decision to loan the money to plaintiff's brother appears to have been a joint decision. The diminution of her estate by both the loan and repayment of alimony based on the Court's mistake, somehow seems unfair.

10. Plaintiff was thirty years of age at the time of trial. She testified that she had two and one-half years of college and that she held certain jobs previously, including teaching dancing, working in window display and as a clerk at ZCMI and a clerk at Stop & Shop. She also testified she helped manage some apartments. Plaintiff also testified that she had not made any attempts to obtain any employment outside of the house. The evidence also showed that plaintiff participated in many types of physical activities

and there were no reasons, health or otherwise, why plaintiff could not be fully employed and contribute to her own needs. Plaintiff could have found appropriate employment which would provide at least a minimum wage income of $736.00 to assist in providing her own needs.

11. The plaintiff received as her share of the property division $1,479,578.00. Realistically, it would not be fair to consider that figure as her investment base. There were obviously attorney fees and costs of the proceeding, as well as taxes to pay, etc. The plaintiff has requested that we deduct from her investment base her purchase of a home and the debt to her from her family.

12. It would not be appropriate to allow the plaintiff to remove the home from her investment base and also allow her to claim rent expense of over $1,000.00 per month.

13. The Court figures with a four percent return on her investment base, the imputed income of $736.00 and the child support, the alimony should be reduced at the end of three years to $3,000.00 per month.

14. The Court previously ordered the alimony to be terminated at the end of six years. That decision was based on the fact that when the defendant was through with basketball, his ability to produce income is frankly no better than the plaintiffs and his present earning ability is

FLORENCE AND HUTCHISON

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

818 - 26TH STREET
OGDEN, UTAH 84401

based strictly upon his status as a professional athlete.

15. In retrospect, that is not entirely correct or it fails to consider the income he will earn in the meantime. His investment base, considering his interim income, should exceed the plaintiff's by several times, giving him by far a superior ability to provide on-going assistance.

16. The final issue requiring consideration is that of the attorney fee award. The stipulation at trial, as the Court understood it, was that if Mr. Dolowitz were called to testify, he would verify the material contained in plaintiff's Exhibit 17 and express the opinion that the time and costs involved were reasonable taking into account the complexity and seriousness of the issues involved. The defendant did not stipulate the charges or time were reasonable, but only that Mr. Dolowitz would testify accordingly.

17. Plaintiff's Exhibit 17 contained a summary sheet of the gross charges, a breakdown of the hourly rate of persons from Mr. Dolowitz's office working on the plaintiff's case, a monthly summary of charges, times and persons and finally a day-by-day account of date, attorney, service description, hours and charge.

18. In considering the complexity of issues, the number of hearings, the conferences, the resolution of

issues, the animosity between the parties, the amounts of money and property, the Court believes the attorney fee charges were not unreasonable.

19. An additional issue relating to attorney fees is the fact that the defendant with a multi-million dollar income clearly has the ability to assist the plaintiff with her attorney fees and in comparison of the resources of the two parties, he is in a much superior position.

20. The final prong of the test established in Bell v. Bell, 810 P.2d 489 (Utah App. 1991) relates to the ability of the plaintiff to pay her own attorney fees. It is clear with the distribution of almost a million and one-half dollars in assets, the plaintiff could pay her own attorney. However, the Court was concerned about the necessity of her being able to maintain an appropriate investment base. The Court was aware that there would be substantial inroad into that base by reason of taxes, the debt owed by her family which is likely uncollectible, court costs, witness fees, attorney fees, etc.

21. In the interest of the plaintiff being able to maintain a base sufficient to provide an appropriate income, she has need of some assistance with her attorney fees.

CONCLUSIONS OF LAW AND ORDER

1. The defendant is awarded all of his NBA or

FLORENCE AND HUTCHISON

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

818 - 26TH STREET
OGDEN, UTAH 84401

basketball related retirements subject to paying the plaintiff one-half of the value in existence at the time of the original divorce trial. The value of the NBA Players Pension Plan presented at the time of trial was $64,758.92, one-half of which would belong to the plaintiff ($32,379.46).

2. In addition, in the past there have been enhancements to the plan having retroactive effect. If enhancements have occurred since the time of the trial of this matter, plaintiff shall be entitled to her share of any such enhancements based on the Woodward formula. This shall apply to any retirements existing at the time of the trial of this matter.

3. A minimum wage income of $736.00 per month should be imputed to the plaintiff.

4. Based on the findings concerning the plaintiff's return on her investment base, her imputed income as stated above and the child support previously stipulated to and ordered, plaintiff's alimony should be reduced to $7,000.00 per month effective with the Court's Memorandum Decision dated July 12, 1993, which shall continue for the balance of the three-year rehabilitative period, after which the alimony should be reduced to $3,000.00 per month.

5. The alimony awarded herein should only terminate upon the occurrence of remarriage, death or operation of law.

6. Based on the findings above and the standards established in Bell v. Bell, 810 P.2d 489 (Utah App. 1991), the $10,000.00 attorney fee award made at the time of trial is hereby affirmed.

ORDER

The Court having issued its Findings of Fact and Conclusions of Law, hereby enters the following order:

IT IS HEREBY ORDERED that defendant be and he is hereby awarded all of his NBA or basketball related retirements subject to paying the plaintiff one-half of the value in existence at the time of the original divorce trial. The value of the NBA Players Pension Plan presented at the time of trial was $64,758.92, one-half of which would belong to the plaintiff ($32,379.46).

IT IS FURTHER ORDERED that in addition, in the past there have been enhancements to the plan having retroactive effect. If enhancements have occurred since the time of the trial of this matter, plaintiff shall be entitled to her share of any such enhancements based on the Woodward formula. This shall apply to any retirements existing at the time of the trial of this matter.

IT IS FURTHER ORDERED that a minimum wage income of $736.00 per month shall be imputed to the plaintiff.

IT IS FURTHER ORDERED that based on the findings

FLORENCE AND HUTCHISON

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

818 - 26TH STREET
OGDEN, UTAH 84401

concerning the plaintiff's return on her investment base, her imputed income as stated above and the child support previously stipulated to and ordered, plaintiff's alimony shall be reduced to $7,000.00 per month effective with the Court's Memorandum Decision dated July 12, 1993, which shall continue for the balance of the three-year rehabilitative period, after which the alimony shall be reduced to $3,000.00 per month.

IT IS FURTHER ORDERED that the alimony awarded herein shall only terminate upon the occurrence of remarriage, death or operation of law.

IT IS FURTHER ORDERED that based on the findings above and the standards established in Bell v. Bell, 810 P.2d 489 (Utah App. 1991), the $10,000.00 attorney fee award made at the time of trial is hereby affirmed.

DATED this 7 day of March, 1994.

BY THE COURT:

STANTON M. TAYLOR, Judge

STATE OF UTAH
COUNTY OF WEBER) ss.

I Hereby Certify That This Is A True Copy Of The Original On File In My Office
DATED THIS 7 DAY OF April 19 94
PAMELA GRUNDER
CLERK OF THE COURT
BY DEPUTY
SECOND DISTRICT COURT
OGDEN, UTAH

NOTICE TO PLAINTIFF

TO DEFENDANT ABOVE-NAMED AND HIS COUNSEL:

Pursuant to Rule 4-504 of the Code of Judicial Administration, you are hereby notified that the undersigned

ORENCE
AND
CHISON

A
ESSIONAL
ORATION

RNEYS AT
LAW

TH STREET
UTAH 84401

will hold the original hereof for a period of five days from the date this notice is mailed to you to allow you sufficient time to file any written objections to the form of the foregoing with the Court and mail a copy to the undersigned. If no objections to the form are filed within that time, the original hereof will be submitted to the Court for signature and filing.

DATED this 25th day of January, 1994.

FLORENCE AND HUTCHISON

BRIAN R. FLORENCE
Attorney for Plaintiff
818-26th Street
Ogden, UT 84401

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Findings of Fact, Conclusions of Law and Order on Remand, postage prepaid, to the following at the addresses listed on this 25th day of January, 1994.

Pete N. Vlahos
Attorney for Defendant
2447 Kiesel Avenue
Ogden, UT 84401

Mark J. Robens
Attorney for Defendant
2901 N. Central Avenue #200
Phoenix, AZ 85012

EILEEN CHRISTENSEN, Secretary

FLORENCE
AND
HUTCHISON

A
PROFESSIONAL
CORPORATION

ATTORNEYS AT
LAW

818 - 26TH STREET
OGDEN, UTAH 84401

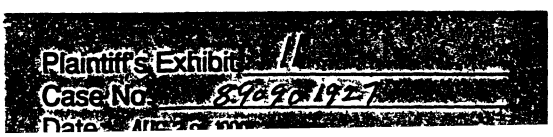
CHAMBERS v CHAMBERS

PLAINTIFF'S PROPOSED SUPPORT

Alimony			$14,060.00
1.	Living Expenses	$9,997.73	
2.	Taxes due (on $10,000/mo)	4,060.60	

1) See attached schedule
2) 3 children as deductions
3) w/o 3 children - $4,261.70

(mcb/dsd/Chambers.ProSet)



CHAMBERS v. CHAMBERS
SUMMARY PROJECTED MONTHLY EXPENSES

DATE: August 28, 1990

Rent and Household	*$1,493.47*
Children - Included on Plaintiff's Schedule	*855.00*
Charge Cards, Covering Expenses for: *Clothing* *Entertainment* *Incidentals Expenses*	*3,539.55*
Food and Supplies	*850.00*
Health Costs	*736.20*
Laundry	*225.00*
Utilities	*571.25*
Insurance	*54.75*
Transportation	*297.51*
Entertainment	*300.00*
Incidentals (see list attached)	*$1075.00*
TOTAL PROJECTED MONTHLY EXPENSES:	***$9,997.73***

CHAMBERS.EX6\HB#2

CHAMBERS v. CHAMBERS
PLAINTIFF'S MONTHLY EXPENSES

DATE: August 28, 1990

RENT AND HOUSEHOLD: *

Rent/Mortgage	$1,020.00
Insurance (1/12)	26.50
Property Taxes (1/12)	114.97
Repairs	50.00
Maintenance/Yard Care	48.00
Maid/Cleaning	$ 234.00
Subtotal:	**$1,493.47**

CHARGE CARDS:

Zions - VISA	$1,000.00
Bank of America	564.55
Nordstrom	1,576.00
Weinstocks	100.00
ZCMI	$ 300.00
Subtotal:	**$3,539.55**

FOOD AND SUPPLIES:

At Home	$600.00
Eating Out	$250.00
Subtotal:	**$850.00**

HEALTH COSTS (Plaintiff and Children):

(Defendant has health insurance - Bills submitted - non-covered expenses unknown)

Doctor	$366.00
Dentist	50.00
Drugs/Prescription	100.00
Children	$220.20
Subtotal:	**$736.20**

*Plaintiff is planning to move - expenses may differ somewhat.

LAUNDRY:

Laundry	*$25.00*
Dry Cleaning	*$200.00*
Subtotal:	***$225.00***

UTILITIES:

Telephone	*$400.00*
Gas	*70.00*
Electric	*75.00*
Water & Sewer; Garbage Collection (North Ogden City)	*$ 26.25*
Subtotal:	***$571.25***

INSURANCE:

Auto	*$54.75*
Medical and Hospital (Paid by Tom)[1]	*?*
Life	*-.-*
Subtotal:	***$54.75***

TRANSPORTATION:

Car Payments	*-.-*
Gas and Oil	*$130.00*
Repairs	*50.00*
License and Tax	*37.51*
Car Wash	*$ 80.00*
Subtotal:	***$297.51***

---

[1] *Plaintiff would like Defendant to be ordered to continue to pay all health insurance premiums and expenses not covered by insurance because of Plaintiff's current medical condition.*

OTHER:

Income Tax Preparation (Paid by Tom)	*?*
Entertainment (additional expenses included in charge card expenses (Traveling)	*$300.00*
Subtotal:	***$300.00***

CHILDREN'S EXPENSES:

Books, Reading Material	*$40.00*
Child Care	*500.00*
Lessons, Costumes, Swimming, Baseball, Soccer	*200.00*
Pre-School (Megan)	*40.00*
School Lunches	*$ 75.00*
Subtotal:	***$855.00***

INCIDENTALS:

Hair and Beauty Care	*$125.00*
Subscriptions (Books, Magazines, Newspapers)	*25.00*
Pets	*75.00*
Church or Synagogue (10% of earnings)	*650.00*
Gifts	*100.00*
Hobbies (needlepoint, etc)	*$ 100.00*
Subtotal:	***$1,075.00***